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85-572
No. 85- - -

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

RINGSBY TRUCK LINES, INC. AND
RINGSBY-PACIFIC, LTD.,
Petitioners,

VS.

TRUCKING EMPLOYERS, INC., TRUCKING MANAGEMENT, INC.,
CALIFORNIA TRUCKING ASSOCIATION, TRANSCON LINES,
CONSOLIDATED FREIGHTWAYS CORP., GARRETT FREIGHT LINES, INC.,
YELLOW FREIGHT SYSTEMS, INC., DISALVO TRUCKING CO.,
LEE WAY MOTOR FREIGHT, INC., and
ILLINOIS-CALIFORNIA EXPRESS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an agreement between a multi-employer bargaining unit and a union to compel non member employers, regardless of the circumstances, to accept whatever is negotiated by the unit and the union or be struck, is a combination and conspiracy in violation of the antitrust laws?

2. Whether a non member employer is injured in its business and property if, pursuant to the agreement between the multi-employer bargaining unit and the union, it is struck for failure to agree to what was negotiated by the unit and the union?

3. Whether direct evidence of statements, conduct, motive and intent showing the existence and objective of the agreement between the multi-employer bargaining unit and the unions to treat non member employers as *de facto* members of the unit is sufficient to withstand a motion for directed verdict?

PARTIES BELOW

Petitioner Ringsby Truck Lines, Inc., a Nebraska corporation, has been engaged in the trucking business throughout the United States and Canada since 1945. Petitioner Ringsby-Pacific, Ltd., was a California corporation and was a wholly-owned subsidiary of Ringsby Truck Lines, Inc. which was merged into its parent in 1978.

Respondents Transcon Lines, Consolidated Freightways Corp., Garrett Freight Lines, Inc., Yellow Freight Systems, Inc., Di-Salvo Trucking Co., Lee Way Motor Freight, Inc., and Illinois-California Express, Inc. are trucking companies. Respondent California Trucking Association is an association of trucking companies who do business in California. Respondent Trucking Employers, Inc. (TEI) is a multi-employer bargaining unit which, in 1977, was reorganized as respondent Trucking Management, Inc.

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OPINIONS BELOW

The memorandum of the Court of Appeals for the Ninth Circuit appears as Appendix A, pages A1-A5. The order of that court denying a timely petition for rehearing and suggestion for rehearing en banc appears as Appendix B, pages A6-A7. The memorandum of decision of the District Court granting the directed verdict motions by defendants appears as Appendix C, pages A8-A15. The District Court's denial of plaintiffs' motion

for reconsideration and for new trial appears as Appendix D, page A16.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on April 12, 1985. A timely petition for rehearing and for suggestion for hearing en banc was filed and was denied by the Court of Appeals in an order entered on July 2, 1985. Jurisdiction in this Court is founded upon 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Sherman Act, 15 U.S.C. §1 provides:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

The Sherman Act, 15 U.S.C. § 2 provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $1,000,000 if a corporation, or, if any other person, $100,000, or by imprisonment not exceeding three years, or by both said punishment, in the discretion of the court."

STATEMENT OF THE CASE

Since 1945, Ringsby has been engaged in the trucking business throughout the United States and Canada. From 1945 through 1969 Ringsby operated one of the most competitive and profitable independent trucking companies in the United States.

In 1969, Ringsby expanded its business and increased its standing as a major national trucking company. By reason of its

discount pricing practices, Ringsby was a serious competitive threat to the defendant trucking companies.

Ringsby was a signatory to the 1973-1976 National Master Freight Agreement (NMFA) with the International Brotherhood of Teamsters ("Union"), and until December of 1975 was represented in collective bargaining negotiations with the Union by Trucking Employers, Inc. ("TEI"). Because it wanted to more closely tailor its labor contract to its own needs, however, Ringsby withdrew from TEI, the Multi-Employer Bargaining Unit in December of 1975 in order to negotiate an independent contract with the Union.

The defendant trucking companies who continued to use TEI to bargain with the Union were concerned that Ringsby would negotiate a better contract than TEI and therefore be in a more favorable competitive position than they. Furthermore, defendants knew that, if there were to be a national strike, which appeared imminent, it was likely that Ringsby would not be struck along with the TEI carriers because Ringsby was negotiating separately.

On March 3, 1976, the Union instructed the sub-committees in charge of meeting with independents like Ringsby, not to reveal to the independent employers that "no matter what his position, [the independent] is going to be bound by the national results."

The defendants' fears materialized when, at midnight on March 31, 1976, the Union struck all the companies who were members of TEI. But even though Ringsby had bargained independently from TEI, the Union struck Ringsby as well. This was because the Union and the TEI employers had previously agreed that, if there were to be a strike, the Union would shut down not only the TEI carriers, but the independents as well. In fact, a pre-strike memorandum reveals that Union negotiators were instructed not to reveal to the independents that "no matter what his position [the independent] is going to be bound by the national results."

On April 3, 1976, the Union and TEI reached agreement on a contract. The nationwide strike against the trucking companies ended on that date. On that same date, the strike against Ringsby

and the other independents also ended, even though Ringsby had not reached agreement on a contract.

After the strike had ended the Union refused to bargain with Ringsby in good faith unless and until Ringsby promised to rejoin the Multi-Employer Bargaining Unit. During the period when Ringsby attempted to bargain with the Union, the defendant trucking companies kept tabs on Ringsby's negotiations. Contrary to their customary practice with other trucking companies who were members of TEI, Ringsby's competitors tried to pick-off Ringsby's customers by warning them that Ringsby would soon be struck.

Meanwhile, the Union continued to insist that Ringsby accept the National Master Freight Agreement which had been negotiated by TEI. The Union made it clear that the only way that Ringsby would get a contract was to agree to the national TEI contract. Finally, on August 26, 1976, after Ringsby again refused to sign the TEI agreement, Ringsby was struck. Ringsby remained struck for the next three years. Among other things, Ringsby's revenues dropped from $63,000,000 to $17,000,000

REASONS FOR GRANTING THE WRIT

The issues raised in the Court below affect all employers who choose not to be members of a multi-employer bargaining unit. If such agreements as the one presented here are permitted, non member employers are deprived of their right to separate and independent negotiations with labor unions. In such a situation, as here, non member employers are bound by their competitors' judgment and needs, not their own. Such a situation is similar to the initial American objection to "Taxation without representation." The same tyranny exists. In the absence of such an agreement between the multi-employer bargaining unit and the unions, many competitive situations would exist, not the least of which was the one stated by the union to the member employers:

> "... the organized trucking industry represented by Associations would be on strike, but the many Employers who asked for individual negotiations would be operating."

1. The Court of Appeals' Memorandum Is In Serious Conflict With Prior Opinions Of That Court and Other Courts

By deciding that there is not sufficient evidence in this case to allow Ringsby's claim to go to the jury, the appellate court has in effect eliminated circumstantial evidence as a predicate for liability in Sherman Act conspiracy cases. This, of course, is not the stated law of that Circuit or of this Court.

Both the Ninth Circuit and this Court have long recognized that conspiracies are not often proved by direct evidence or admissions and that

> . . . any conspiracy can ordinarily *only* be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. *Esco Corp. v. United States,* 340 F.2d 1000, 1007 (9th Cir. 1965). (Emphasis added.)

And all that need be shown are

> . . . circumstances . . . to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement . . . *American Tobacco Co. v. United States,* 328 U.S. 781, 810. (1946)

Neither written nor oral assurances are necessary to establish the "mutual consent". As the Ninth Circuit has held in the context of a price-fixing conspiracy:

> With this we disagree, if by it appellant means the existence of specific assurances. Written assurances it concedes, are unnecessary. So are oral assurances, if a course of conduct, or a price schedule, once suggested or outlined by a competitor in the presence of other competitors, is followed by all—generally and customarily—and continuously for all practical purposes, even though there be slight variations.
>
> It is not necessary to find an express agreement, either oral or written, in order to find a conspiracy, but it is sufficient that a concert of action be contemplated and that defendants conform to the arrangement. (Cites omitted). Mutual consent need not be bottomed on express agreement, for any con-

> formance to an agreed or contemplated pattern of conduct will warrant an inference of conspiracy. *Esco Corp. v. United States,* 340 F.2d at 1008.

Indeed, as this Court held in announcing the classic "hitching post" doctrine:

> It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. (Cites omitted). Acceptance by competitors, without precious agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Interstate Circuit v. United States,* 306 U.S. 208, 227 (1939).

Furthermore, evidence of meetings and the opportunity to agree is a probative fact:

> It is uncontroverted that this committee held meetings at which Laswell, as well as representatives of the other defendant corporations, was present during the period covered by the indictment. That an opportunity was thus afforded to discuss and agree upon prices and pricing policies on an industry-wide basis, cannot be denied. Appellants seek to destroy any probative value from such a stipulation by pointing out that there is no direct evidence of what transpired at those meetings. But the trial court, sitting as the trier of the facts, regarded this evidence as being another one in a series of "plus factors" which, when standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt, but which, when viewed as a whole, in their proper setting, spelled out that irresistible conclusion. *C-O Two Fire Equipment Co. v. United States,* 197 F.2d 489, 493 (9th Cir. 1952).

Both *Esco* and *C-O Two Fire* were criminal cases in which the Ninth Circuit sustained findings of conspiracy based upon circumstantial evidence where the standard of proof was beyond a reasonable doubt, a much higher standard than in this case.

Furthermore, the evidence of conspiracy in this case is much stronger than in the others. The Union attorney's statement to the employers that "you know" "we have struck" "when an unrepresented employer after meeting with us does not want to take the National Master Freight Agreement" (PX 71, p. 49) is an even more forceful statement of conspiracy than the proof elicited in *Esco* of a course of conduct proposed by one and followed by all.

The Union attorney's statement is also tantamount to the same invitation to conspire which was described by this Court in *Interstate Circuit*. In this case, however, the Union was not suggesting a new course of conduct but rather simply reconfirmed its longstanding agreement, which was previously implied and now expressed because the Union needed reconfirmation of the employers' support.

2. The District Court Improperly Weighed The Evidence And Drew Inferences In Favor Of Defendants Rather Than Plaintiffs

The district court has improperly dissected, interpreted, explained and weighed the evidence in this case in complete derogation of this Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). Turning this Court's opinion on its head, the Court has again analyzed each piece of evidence offered by plaintiff in the light most favorable to *defendants*, drawn all inferences in *defendants'* favor, decided all issues of credibility in favor of *defendants*, and then argued that each piece of evidence standing alone, is insufficient to give rise to conspiracy. This procedure is exactly what this Court has admonished that a judge may not do in an antitrust case.

Continental Ore requires the reviewing judge to "view the evidence in the light most favorable to [Ringsby] and to give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Id.* at 696. Moreover, in the same opinion the Supreme Court cautioned:

> The Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits.

> We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten,* 226 U.S. 525, 544, 33 S.Ct. 141, 57 L.Ed. 333; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it. [Cites omitted]. *Id.* at 698-699.

The Court of Appeals has admitted that the evidence in this case is sufficient to show that "the union and the employers may have conspired to construe the agreement to authorize the April strike." (App. A, p. A3.) But because the Court has improperly separated and compartmentalized Ringsby's proof, it has ignored the evidence of the Union-TEI conspiracy to strike independent employers who do not accept the national contract.

Furthermore, the Court has improperly interpreted, explained and weighed the evidence and in so doing has usurped the role of the jury. Although it would admit Dwyer's testimony as evidence that the TEI carriers were concerned that Ringsby would negotiate a more favorable contract than the national organization, it dismisses this evidence as merely showing the "employers' concerns." But the very fact that the employers were concerned about Ringsby's separate negotiations is in itself evidence of the employers' motive, purpose and intent to participate in the Union's conspiracy.

Because each of the segmented pieces of evidence recited by the Court in its Memorandum, if taken as a whole and viewed in the light most favorable to plaintiff, supports a conclusion opposite to that reached by the trial court, this case must be submitted to a jury for a determination by the trier of fact.

3. The Courts Below Misapprehended The Import Of A Recent Supreme Court Opinion

At page A2 [illegible] Memorandum (App. A, p. A2), the Court of Appeals refer[illegible] *Monsanto Co. v. Spray-Rite Service Corp.,*

___ U.S. ___, 104 S.Ct. 1464 (1984) as the most recent articulation of the conspiracy standard in Sherman Act cases. The Court's reliance upon *Monsanto* is misplaced.

First, the Court referred to the *Monsanto* case as one "which also involved an appeal from a directed verdict." (App. A, p. A2.) In actual fact, however, *Monsanto* was appealed from a jury verdict in favor of the plaintiff which was affirmed on appeal by the Seventh Circuit. This Court also affirmed the jury verdict.

Second, Ringsby has shown the same if not stronger circumstantial evidence of the existence of a conspiracy as was allowed by this Court to support the judgment in *Monsanto.*

In *Monsanto,* for example, this Court relied upon evidence that "about five months *after* Spray-Rite was terminated, [Monsanto] approached price-cutting distributors and advised that if they did not maintain the suggested resale price, they would not receive adequate supplies of Monsanto's new corn herbicide." (*Id.* at 1471) (Emphasis added). This Court described this evidence as "plainly relevant and *persuasive* as to a meeting of minds." *Id.* (Emphasis added).

This evidence shows that a conspiracy may be proved from subsequent as well as contemporaneous acts taken in furtherance of the conspiracy.

In the Ringsby case, there is the very same, if not stronger, evidence that *after* the August strike, both in March and again in September of the following year, the Union communicated its understanding to the TEI employers at the grievance hearings and gave the employers the opportunity, which they took, to *confirm* that agreement by voting to defeat Ringsby's grievances.

Additional, but "more ambiguous" evidence relied upon by this Court in *Monsanto* was a newsletter which discussed Monsanto's efforts to 'get the "market place in order" ' (*Id.*) which this Court found "reasonable to interpret as referring to an agreement or understanding that distributors and retailers would maintain prices . . . . " *Id.* at 1472.

Likewise in the Ringsby case, there is similar evidence that Ringsby was discussed during the negotiating sessions between

the Teamsters Union and the TEI employers and that the carriers had expressed concern that Ringsby might do better than the national contract if Ringsby were allowed to negotiate separately (RT 2818-2820). Furthermore, there is evidence that, even before the Teamsters struck Ringsby in August, Ringsby's competitors warned Ringsby's customers not to ship via Ringsby Truck Lines since Ringsby was to be struck for not having agreed to the national contract. (RT 2009:21-2011:6; DX HHH). Later, the employers ratified their understanding with the Teamsters Union because otherwise it "would provide a tough economic situation for the TEI carriers to be in." (RT 1373:23-1374:24).

Finally, but no less importantly, in *Monsanto,* this Court confirmed the integrity of the jury's prerogative to draw its own inferences from the evidence and to make decisions on the credibility of witnesses. For example, this Court stated at footnotes 11 and 12 that "the interpretation of documents and the testimony surrounding them properly was left to the jury" and that "the choice between two reasonable interpretations of the testimony properly was left for the jury." *Id.* The Ninth Circuit, on the other hand, confronted with a conflict in testimony over whether or not it was customary in the industry to solicit the business of an employer who was having labor problems, as was Ringsby, sided with appellee's version of the facts and chose to believe the opposite of the explanation most favorable to Ringsby, (App. A, p. A3-A4), even though the testimony established that it was not customary in the industry to go after a struck carrier's customers:

> "Q: Is it customary in the industry, as far as you know, that if one of your competitors is struck while you are operating you go after their customers?
>
> A: No. I don't think that is customary.
>
> Q: Why not?
>
> A: I just don't think it is." (RT 1128:10-21)

Nevertheless, the Court improperly concluded that "there was no custom concerning a competitor's business during a strike."

(App. A, p. A4.)

4. Plaintiffs Have Been Deprived Of Their Vital Right To A Jury Trial

Ringsby is not asking that judgment be entered in its favor on this appeal. Rather, it is asking nothing more than that this Court confirm its constitutional right to a jury trial on the merits.

It is clear that neither the trial judge nor this Court may substitute its view of the facts for that of the jury.

This Court has spoken about the importance of a jury to the enforcement of the antitrust laws, and the relationship between the two, in unmistakable language.

It has held that a jury trial in an antitrust case is "an *essential* part of the Congresssional plan for making competition rather than monoply the rule of trade." *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 504 (1959).

This special regard for the importance of a trial by jury in antitrust cases goes hand-in-hand with this Court's unequivocal recognition of the importance of the antitrust laws to our system of government extending as those laws do to our social and political as well as to our economic well-being. There is little else that this Court could have said to emphasize this role than its decision in *U.S. v. Topco Associates, Inc.,* 405 U.S. 596 (1972):

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free-enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.

Our free-enterprise system serves as one of the basic foundations of the United States. The free-enterprise system distin-

guishes the United States from most, if not all, countries of the world. It is and always has been the aim of the United States to seek to encourage individual endeavor.

A violator of the antitrust laws—if so found by a jury—directly impacts our system of free-enterprise. As this Court said in *Hawaii v. Standard Oil Co. of California,* 405 U.S. 251, 263 (1972): "Every violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."

5. There Was Substantial Evidence To Give Rise To Conspiracy

The Courts below fundamentally misunderstood the conspiracy between the Union and the defendant trucking companies, and as a result, incorrectly concluded that the evidence presented was insufficient to support a verdict.

At page A3 of its Memorandum, the Court of Appeals concludes that even assuming this evidence establishes a union-employer conspiracy, it was a conspiracy to *authorize* the *April* strike, which in no way proves that the employers again conspired with the Union to bring about the August strike." (App. A, p. A3.) (Emphasis in original) The Court then recites what it believes to be Ringsby's argument on conspiracy: "Ringsby argues that prior to the April strike, the employers and the union had an 'understanding' that if an agreement was not reached, the union would strike the entire industry." (App. A, p. A3.)

It is apparent from these lines that the Court has misconstrued the nature, terms and extent of the conspiracy that existed.

The conspiracy that the Court has defined, and according to which it analyzed all of Ringsby's evidence, amounts to nothing more than an agreement to strike the industry if no agreement has been reached on a national contract. In fact, however, the actual agreement which existed, and which was proved by Ringsby but misapprehended by the Court, was the understanding that once the Union had negotiated a national contract with TEI, all the remaining employers, including the independents, would be required to sign and accept the terms of the national contract or be

struck. This understanding was succinctly stated by the Union to the TEI-represented employers as follows:

> "... you know there have been hundreds of strikes against non-represented employers over the last 13 years at least or 14 years since we had the National Master Freight Agreement *when an unrepresented employer after meeting with us decides that he does not want to take the National Master Freight Agreement... and we have struck.*" (PX 71)

To be sure, this understanding resulted in the April 1 industry strike because the effect of the agreement was to treat the independents as *de facto* members of the multi-employer bargaining group. But what the Court did not recognize is that this understanding also resulted in the August strike against Ringsby because Ringsby refused to sign and accept the terms of the national contract.

Once the true nature of the agreement is understood, Ringsby's so-called "causation deficiency" evaporates. The facts are that 1) Ringsby was an unrepresented, independent employer; 2) Ringsby was struck on April 1 when the represented employers were struck; 3) after the April strike, the represented employers agreed to a national contract; 4) Ringsby thereafter would not agree to the national contract; 5) Ringsby was struck again because it would not agree to the terms of the national contract.

The causal connection between the underlying agreement and the August strike is obvious, clear, logical, and certainly reasonable once the actual conspiracy is identified.

Since the injury (strike) to Ringsby was "precisely the type of loss that the claimed violations of the antitrust laws would be likely to cause", *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 125 (1969), the connection between the conspiracy to strike those independents who did not agree to the NMFA and the strike against Ringsby for not agreeing to the NMFA is *at best* a question of fact for the jury:

> "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable (cites omitted). That conclusion,

whether it relates to negligence, *causation* or any other factual matter, *cannot be ignored." Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944) [Emphasis added.]

CONCLUSION

It is against this backdrop of strong public policy in favor of the antitrust laws and the right to trial by jury that the petitioners respectfully submit and justice requires that this Court offer its guidance. Certiorari should be granted.

Respectfully submitted,

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(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit
Nos. 84-1598 & 84-1925
DC No. C-79-0321
WAI

Ringsby Truck Lines, Inc. and Ringsby-Pacific, Ltd.,
Plaintiffs-Appellants,

v.

Trucking Employers, Inc., Truck Management Inc.,
Cal. Trucking Asso., Consolidated Freightways Corp.,
IML Freight, Inc., et al.,
Defendants-Appellees.

Filed April 12, 1985

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Hon. William Ingram, U.S. District Judge, Presiding

Argued and Submitted January 16, 1985

Before: FLETCHER, BOOCHEVER, and NORRIS, Circuit Judges

Ringsby appeals from a directed verdict for appellees, Trucking Employers, Inc., et al. We conclude that Ringsby did not present substantial evidence of a conspiracy or substantial evidence that the alleged conspiracy caused any injury. We note at the outset that the trial judge clearly applied the correct legal standard, giving Ringsby the benefit of every reasonable inference. *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 733 (9th Cir. 1979).

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*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

In order to overturn the directed verdict, Ringsby is required to show that it presented substantial evidence of an antitrust conspiracy. Specifically, Ringsby had to present substantial evidence that there was an agreement between the members of the multi-employer bargaining unit and the Teamsters to impose the terms of the "Multi-Employer Collective Bargaining Agreement" on Ringsby. *See Bodine Produce, Inc. v. United Farm Workers Organizing Committee,* 494 F.2d 541, 550-53 (9th Cir. 1974). In *Monsanto Co. v. Spray-Rite Service Corp.,* 104 S. Ct. 1464 (1984), the most recent articulation of the showing that a plaintiff must make in a conspiracy case, the Supreme Court reinforced the approach of *Bodine Products. Monsanto,* which also involved an appeal from a directed verdict, held that a plaintiff must present some evidence that tends to exclude the possibility that the defendants were acting independently. *Id.* at 1471. That is, a plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* (quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981)).

A union's unilateral decision to attempt to impose the terms of a collective bargaining agreement on all employers is not by itself sufficient to prove an employer-union conspiracy. *See United Mine Workers v. Pennington,* 381 U.S. 657, 662-69 (1965); *James R. Snyder Co. v. Associated General Contractors of America,* 677 F.2d 1111, 1123 (6th Cir.), *cert. denied,* 459 U.S. 1015 (1982); *Smitty Baker Coal Co. v. United Mine Workers,* 620 F.2d 416, 434 (4th Cir.), *cert. denied,* 449 U.S. 870 (1980).

Thus, our task in this case is to consider whether all of Ringsby's evidence, disregarding any preclusive effect of the earlier litigation, was insufficient to defeat a directed verdict motion in light of the legal standards we have outlined. We will consider each piece of evidence that Ringsby advances in turn.

1. *Discussions During Grievance Proceeding and Previant Letter.*

To establish the existence of a conspiracy, Ringsby relies heavily on statements by Teamster Attorney Previant to the effect that the Teamsters had consistently struck employers who had not signed the multi-employer bargaining agreement. This evidence can be taken to show that (1) the union decided to impose the terms of the contract on all employers; (2) the employers recognized it was in their best interest to interpret the contract as permitting strikes short of a bargaining impasse; (3) the employers recognized it was in their best interest for the union to strike *all* employers at one time; and (4) the union and the employers may have conspired to construe the agreement to authorize the April strike. This evidence is deficient, however, because (1) the mere fact that the employers recognized that an industry-wide strike was in their best interest does not show that they conspired with the Teamsters to that end; and more important, (2) even assuming this evidence establishes a union-employer conspiracy, it was a conspiracy to *authorize* the *April* strike, which in no way proves that the employers again conspired with the union to bring about the August strike. There was no question that the second strike was authorized under the contract and no showing by Ringsby that the employers encouraged the union to strike Ringsby again.

2. *Employers' "Understanding" Concerning the April Strike*

Ringsby argues that prior to the April strike, the employers and the union had an "understanding" that if an agreement was not reached, the union would strike the entire industry. The evidence Ringsby points to in support of this proposition suffers from the same "causation" deficiency noted above; this does not prove any employer-union conspiracy to bring about the *August* strike. Moreover, the evidence shows that the "understanding" was nothing more than awareness by the employers of the union's plans. Awareness does not equal agreement.

3. *Conduct of Trucking Companies After August Strike*

Ringsby asserts that some of the defendants sought the business of Ringsby's customers during the August strike, contrary to

an alleged industry practice. But the evidence upon which Ringsby relies shows that there was no custom concerning a competitor's business during a strike. Moreover, this is competitive behavior, which the antitrust laws seek to foster. And it simply does not show any prior employer-union agreement to cause the strike.

4. *Employers' Efforts to Keep Ringsby in Bargaining Unit*

When Ringsby indicated he would withdraw from the bargaining unit, the employers responded that "[y]our continued support is an obligation." Later, the union stated to Ringsby that he was "obligated" to continue to be a member of the multi-employer bargaining unit." Ringsby argues that this is parallel conduct, which showed that the union and the employers had agreed that they would force Ringsby to accept the national agreement. But the employers' letter clearly was not talking about any legal obligation; it was merely an expression that Ringsby should support the multi-employer association because its efforts benefitted Ringsby in the past. The union letter was talking about something completely different; it referred to the Teamsters' position that Ringsby was still bound by the national agreement then in effect, despite the fact that the union acceded to negotiate separately with Ringsby on a new contract.

5. *Employers' Concerns that Ringsby Might Negotiate a Better Contract than TEI*

Finally, Ringsby asserts that a vice-president of TEI told him that if Ringsby negotiated independently, they were afraid he might get a better contract than the national agreement. Here again, this evidence is deficient because, at most, it merely shows the employers' concerns; it does not show any employer-union agreement.

6. *The Dwyer Testimony*

We do find merit in Ringsby's claim that the district court erred in excluding the Dwyer statement as hearsay. The evidence in question was deposition testimony by J.W. Ringsby about statements made to him by Tom Dwyer about statements made in Dwyer's presence at an employers' negotiation meeting. This was

hearsay within hearsay within hearsay, and to be admissible each level of hearsay must itself be admissible. Fed. R. Evid. 805. The first level, the deposition, is admissible under Fed. R. Evid. 804(b)(1). The second level, Dwyer's statement to Ringsby, is admissible as the admission of a party opponent under 801(d)(2). The third level, the other employers' statements to Dwyer at the negotiation meeting is also admissible under 801(d)(2). The district court erred as a matter of law in imposing an inherent reliability prerequisite for the admission of this testimony. However, we conclude that even with the addition of this evidence, and even assuming its reliability, Ringsby still fails to present substantial evidence of an antitrust conspiracy.

We decline to reach the collateral estoppel issues, the arbitral immunity issues, and the issue as to whether individual defendants were linked to the conspiracy. We also conclude that Ringsby's appeal was not frivolous and that attorney's fees should not be awarded. The judgment in favor of defendants-appellees is AFFIRMED.

Appendix B

United States Court of Appeals
For the Ninth Circuit

Nos. 84-1598 & 84-1925

DC No. C-79-0321
WAI

Ringsby Truck Lines, Inc., and
Ringsby-Pacific, Ltd.,
Plaintiffs-Appellants,

v.

Trucking Employers, Inc., Truck Management Inc.,
Cal. Trucking Asso., Consolidated Freightways Corp.,
IML Freight, Inc., et al.,
Defendants-Appellees.

[Filed July 2, 1985]

Appeal from the United States District Court
for the Northern District of California

Hon. William Ingram, U.S. District Judge, Presiding

Argued and Submitted January 16, 1985

Before: FLETCHER, BOOCHEVER, and NORRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The memorandum disposition dated April 12, 1985 is modified as follows:

Delete the following material from page 2, line 26 through page 3, line 4—; "*James R. Snyder Co. v. Associated General Contractors of America,* 677 F.2d 1111, 1123 (6th Cir.), *cert. denied,* 459 U.S. 1015 (1982); *Smitty Baker Coal Co. v.*

United Mine Workers, 620 F.2d 416, 434 (4th Cir.), *cert. denied,* 449 U.S. 870 (1980)."

Date: June 27, 1985

Reply to Attn of: Judge Norris

Subject: Ringsby Truck Lines, Inc. v. Trucking Employers, etc. Nos. 84-1598, 84-1925

To: Clerk of Court

[Filed July 2, 1985]

All judges concerned having concurred in the attached ORDER, you will please file it.

Appendix C

In the United States District Court
for the Northern District of California

No. C-79-0321-WAI

Ringsby Truck Lines, Inc., et al.,
Plaintiffs,
vs.
Trucking Employers, Inc., et al.,
Defendants.

[Filed Dec. 13, 1983]

MEMORANDUM OF DECISION

The motions of defendants and each of them to strike the evidence, both testimonial and documentary heretofore conditionally admitted, and for directed verdicts under Fed. R. Civ. P. 50(a), are each GRANTED.

Plaintiffs are entitled on these directed verdict motions by defendants to every intendment in their favor, *Santa Clara Valley Distributing Co., Inc. v. Pabst Brewing Company,* 556 F.2d 942 (9th Cir. 1977), but in order to survive the motions plaintiff must have presented substantial evidence sufficient to support a finding of reasonable jurors in plaintiffs' favor. *Westinghouse Electric Corporation v. CX Processing Laboratories, Inc.,* 523 F.2d 668 (9th Cir. 1977); *Chisholm Brothers Farm Equipment Co. v. International Harvester Co.,* 498 F.2d 1137 (9th Cir. 1974). Substantial evidence means more than a scintilla. *Idem.*

Plaintiffs have produced no substantial evidence in support of their contention that the strike against them by unions affiliated with The International Brotherhood of Teamsters ("Teamsters") was the proximate result of conspiratorial agreement between Teamsters and defendants, or that the strike was actuated by predatory intent. Rather, the *only* inference that arises from the circumstances of the strike is that it occurred as the result of the unilateral acts of Teamsters in their own interest, for which no liability can accrue to defendants. *United Mine Workers v. Pennington,* 381 U.S. 657, 665 (1965); *South-East Coal Co. v. Consolidated Coal Co.,* 434 F.2d 767, 782 (6th Cir. 1970).

In order to get to the jury, plaintiffs must offer substantial evidence that the injury of which they complain, here the strike of August 26, 1976, was proximately caused by (1) an agreement between Teamsters and defendants which is violative of the Sherman Act, and (2) that the agreement was entered into with predatory intent. *James R. Snyder Co. v. Associated General Contractors of America,* 677 F.2d 1111 (6th Cir. 1982).

Although the presence of sufficient substantial evidence to raise an inference of conspiratorial agreement is questionable, for the purposes of this portion of this decision it is assumed that sufficient substantial evidence was proffered for that purpose. Notwithstanding such an assumption, there is no evidence that the strike in question was a product of such an agreement. Plaintiffs rely primarily for their proof of agreement upon the Previant statements contained in the transcript of the minutes of the National Grievance Committee meeting of March 2, 1977 (Ex. 71), and in the Previant memorandum furnished to Mr. O'Connor on or about September 8, 1977. (Ex. 56). To show predatory intent they rely on testimony of Mr. McIntyre, elicited at the trial of the labor case, and upon the Previant memorandum. (TR 20: 2942-2948). They apparently rely also upon Conclusion of Law No. 17 in the labor case.

The portion of the minutes of the March 2, 1977, meeting, upon which reliance is placed is the following statement of Previant:

> You cannot as a matter of law disagree with the law as I believe it is and as we have interpreted it right in this room for as long as I can remember and you know there have been hundreds of strikes against non-represented employers over the last 13 years at least or 14 years since we had the National Master Freight Agreement when an unrepresented employer after meeting with us decides that he does not want to take the National Master Freight Agreement or if we disagree on what modifications and many times we have made modifications in order to get an agreement but we have struck . . . .

The portion of the memorandum marked Ex. 56, which is relied upon is:

> It should be pointed out to the employers that unless they agree to that interpretation, its entirely likely that the unions could strike the represented employers but still could not strike the unrepresented employers with whom they have had very little or no negotiations at all.
>
> Therefore the organized trucking industry represented by associations would be on strike but the many employers who asked for individual negotiations would be operating.
>
> Although the strike against Ringsby lasted only five days, Ringsby is asking for $800,000 in damages plus punitive damages which could go sky high. It would also be an unfortunate result if the employers did not accept this interpretation, because there are many other independent carriers who are waiting to see what happens to Ringsby. If Ringsby prevails, they may be starting damage suits, because they were also struck on April 2nd.

The portion of the McIntyre testimony referred to is found at TR 10: 1376-1377; 20: 2947-2948.

> Q. All right. I know what the language is. How would the interpretation affect who's going to be struck?
>
> A. The hypothetical situation where negotiations with respect to the organized portion of the industry, so to speak, say the T.E.I. represented carriers, that a situation in bargaining would be created that was properly described as impasse. Now . . . .
>
> Q. And that would be a time when there had been no bargaining commenced with the other people?
>
> A. Or very little or—
>
> Q. And that was in the light of your understanding of the way in which the industry operated and which the initial bargaining was with the Multi-Employer Unions (sic)?
>
> A. Right.

Q. Is that right? You know that's the way they have always done it, they start with the Multi-Employer Unions (sic) and then they go to the others?

A. That's right. They've always done that.

Q. And if they followed the procedure and didn't get around to discussing it with the others but did reach an impasse with multi-employer groups and an impasse was required, then they would only be able to strike the multi-employer groups and not the others?

A. Right.

Q. And you didn't think that was a terribly good idea?

A. We didn't believe that that could ever be the intent of the employer representatives who negotiated the contract.

Q. Because that would be against the interest, as you said, it would put the T.E.I. members in a precarious economic position, right?

A. That's right.

Q. Because the other people who hadn't reached an impasse while T.E.I. members were on strike would be able to....

A. Continue operating.

Q. Right.

Plaintiff additionally relies on the expressions made at the employer caucus of September 8, 1977, and upon the employers upholding the interpretation of Article 39, included in the Previant memorandum.

The element of predatory intent is set forth in *Snyder, supra,* and in *Smitty Baker Coal Co. v. United Mine Workers,* 620 F.2d 416 (4th Cir. 1980). Any asserted anti-trust violation in a labor management context such as this must arise out of predatory intent. *South East Coal, supra, Smitty-Baker, supra.* Such a predatory intent is the elimination of competitors or the driving of competitors from the field of competition. As said in *Smitty-Baker,* 620 F.2d at 431:

> To repeat: it is not enough that the Union may have entered into a contract with a multi-employer unit in a national industry to establish an anti-trust violation by the Union or, for that matter, the employer group. That may in some cases take the action out of the exemption enjoyed by labor, but it will not *per se* amount to an anti-trust violation. To amount to an anti-trust violation the agreement must be rooted in an anti-competitive purpose, and must affect an anti-competitive result, as evidenced by action 'ruining' a competitor's business or driving him 'out of business'. Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the anti-trust laws.

Recognizing that predatory intent is an element of the claim stated, plaintiffs rely for the fulfillment of that element upon the evidentiary items already mentioned to show that the long standing agreement between Teamsters and defendants was that Teamsters would strike all non-represented employers if it struck the represented employers because of a failure to agree with the latter upon contractual terms, *for the anti-competitive purpose of not allowing the unrepresented employers to continue operating at a time when the represented employers were struck, thus denying the former a competitive advantage and consequently, injuring them in their business.* TR 20: 2944-2950.

There is no evidence in the record of this case which supports an inference that there was any anti-competitive purpose other than that outlined above. A search of the record yields not a scintilla supportive of any inference that anyone by words or conduct entertained any intent to utilize collective bargaining economic pressures to permanently and ruinously injure the business of a trucker in order to benefit the competitive position of represented employers, at a time when represented employers were not on strike and were fully active and competitive.

If it is assumed, as it has been for the purposes of this decision, that there are inferences of conspiracy and predatory intent which plaintiffs are entitled to the benefit of on these Rule 50(a) motions, it is clear from the evidence that nothing supports a causal connection between the predatory anti-competitive intent

which plaintiffs claim, and the injury by reason of which they claim damages.

The record is simply not susceptible of an inference that anyone entertained an intent to foreclose an employer from competitive effort in the absence of a strike against represented employers.

At TR 20: 2955, plaintiffs seem to suggest that, based on the understanding of 13 or 14 years between defendants and Teamsters unrepresented employers who do not accept the Master Agreement be struck, the August 26 strike occurred with the anti-competitive intent of punishing plaintiffs because they sued Teamsters. No evidence either express, implied or inferable from conduct supports such an inference of intent on the part of defendants, or on the part of Teamsters for that matter. Plaintiffs offered evidence of instances of solicitation of plaintiffs' customers by some defendants during the course of the August 26, 1977 strike. No inference of anti-competitive conduct unrelated to legitimate business practice can arise therefrom. *Cf., Zoslaw v. MCA Distributing Co.*, 693 F.2d 870 (9th Cir.1982).

To suggest an inference of a general intent to destroy plaintiffs' business from the evidence in the record and as above discussed is bootstrapping. There is no substantial evidence to support such an inference, and it is primarily for that reason that the motions are granted.

Undoubtedly it is a theory of liability that by Teamster's effective compulsion of adherence to the National Master Freight Agreement by all truckers, whether affiliated with a multi-employer unit or not, the anti-competitive purpose of precluding more favorable agreements negotiated by individual unrepresented employers is served and implemented, all to the competitive advantage of the employers signatory to the National Agreement.

Substantial evidence to support that predatory intent is absent from the record. The inference raising capabilities of the Previant statements (Exs. 56 and 71) and of the demonstrated conduct at the March 2, and September 8, 1977, meetings are necessarily limited by the context in which they exist; that of the industry-

wide strike of April 1, 1976. There is no warrant in the evidence to draw a broader inference.

Unlike the situation in *Eastman Kodak Company of New York v. Southern Photo Materials Company*, 273 U.S. 359 (1927), the circumstances disclosed in this case with respect to alleged predatory intent for the reasons stated do not give rise to a just and reasonable inference sufficient to warrant submission to the jury.

Moreover, it is doubtful that the evidence can premise any inference of conspiracy or of the existence of predatory intent by reason of the application of the doctrine of issue preclusion. Memorandum Decision October 16, 1981; TR 5:556.

Finding's 69(c) and 19, and Conclusion 17 in its entirety, in particular, are preclusive of liability predicated upon anti-trust violations actuated by predatory intent. In ruling on the previous summary judgment motion, this Court based its denial on the absence of express reference to those issues except for the reference to the pivotal issue of anti-trust law violations alluded to in Finding 79.

Further consideration, and the opportunity to evaluate the matter after eighteen days of trial, convince the Court that it misapprehended the presence of triable issues of fact with respect to issues of conspiracy and predatory intent, and that those issues are indeed precluded of further litigation.

While the trial court in the labor case acknowledged the presence of "anti-trust violations" issues (Finding 79), it chose not to deal with them specifically, except insofar as they must be encompassed within the meaning of Conclusion 17:

> This court concludes that the record contains no evidence whatever of corruption, fraud or undue means in connection with the NCC's March 2, 1977 or September 8, 1977 rulings.

17(d)

> The September 8, 1977 memorandum from counsel to Union Chairman Williams cannot reasonably be construed as in any way a threat to strike over anything connected with Ringsby.

Rather it simply mentioned the possible practical consequences in the next NMFA negotiations were the contract interpreted to condition strike action upon impasse to make the point that this could hardly have been the intent of those who negotiated the language.

17(c)

No evidence has been adduced that the September 8, 1977 interpretation was prompted by considerations not germaine to the issues it raised or tainted by bad faith or motives to 'tank' Ringsby. On the contrary, the record demonstrates that the ruling was based upon the parties' practices of long standing, their understanding of the contract language in question, and other proper considerations going to the intent of those who negotiated it.

The obvious view of the trial judge who signed and filed the foregoing was that the rulings demonstrated no impropriety, fraud or unlawful motive. It is not a giant leap to extend the Findings and Conclusions to the anti-trust issues which the court acknowledged were before it. This Court has not done so heretofore, and does not do so now, except to state its present view that this Court and the parties embarked upon a protracted complicated and expensive proceeding in an exceedingly fragile vessel.

The Rule 50(a) motions are GRANTED for the reasons stated. This decision is not based upon the fact that the Court is now of the view that it improvidently denied the motion for summary judgment.

DATED: December, 1983

WILLIAM A. INGRAM
United States District Judge

Appendix D

In the United States District Court
For the Northern District of California

Ringsby Truck Lines, Inc., et al.,
Plaintiffs,

v.

Trucking Employers, Inc. et al.
Defendants.

[Filed Feb. 29, 1984]

No. C-79-0321-WAI

Order Denying Plaintiffs' Motion for
Reconsideration and for New Trial

Plaintiffs' motion for reconsideration and for new trial came on for hearing by the Court on February 13, 1983. Counsel for all parties were present, the matter was fully argued and the Court fully advised as to it.

IT IS HEREBY ORDERED that plaintiffs' motion be, and it hereby is, DENIED.

Dated: February 13, 1984.

WILLIAM A. INGRAM
William A. Ingram
United States District Judge